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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 853

SERROL DUBIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals, Lake County, Ohio
(Seventh Ohio Appellate District).

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OPINIONS BY COURTS BELOW.

Two opinions were delivered by the Court of Appeals for Lake County, Ohio (Seventh Ohio Appellate District). One of the opinions was the dissenting opinion of two of the three judges of the said Court of Appeals, wherein the dissenting judges held that the verdict and judgment were against the weight of the evidence but could not be reversed because of the provision set forth in the Ohio Constitution which proscribes the reversal by a court of appeals of a judgment entered on a jury verdict on the basis that the verdict is against the weight of the evidence except upon the concurrence of all three judges thereof. The third judge, in his written opinion, held that the judgment should be sustained. The two opinions are set forth in the appendix hereto at pages 27-38. Neither of such opinions has yet been reported officially or unofficially.

JURISDICTION OF THIS COURT.

The Petitioner herein requests review of a judgment of the Court of Appeals for Lake County, Ohio (Seventh Ohio Appellate District), affirming the verdict and judgment of the Court of Common Pleas, Lake County, Ohio, wherein Petitioner was found guilty of the offense of Arson under an indictment of the Grand Jury of said county, Petitioner having been sentenced to an indeterminate term of Two to Twenty years in the Ohio State Penitentiary at Columbus, Ohio. Upon application to said Court of Appeals, rehearing was had, after which said court, by entry dated and filed on February 16, 1966, affirmed the verdict and judgment of the Lake County Court of Common Pleas.

Petitioner's "Motion for Leave to Appeal" which was duly filed in the Supreme Court of Ohio was overruled by said court on September 21, 1966. Entry thereof was effected on September 21, 1966 (Appendix, page 41).

The motion of Respondent State of Ohio to dismiss Petitioner's Appeal as of Right to the Supreme Court of Ohio, which appeal was predicated upon federal and state constitutional issues, was granted and entered on September 21, 1966 (Appendix, page 40).

The Supreme Court of Ohio thus refused to accept jurisdiction respecting Petitioner's appellate action therein.

Jurisdiction to review the judgment of the Court of Appeals for Lake County, Ohio, said judgment being the final judgment rendered by the highest court of the State of Ohio in which a decision could be had in this matter, is found in Title 28, U. S. C., Section 1257(3).

QUESTIONS PRESENTED.

1. Did not Petitioner suffer an abridgment of his Fourteenth Amendment right to equal protection of the laws when:

(a) Article IV, Section 6, Constitution of the State of Ohio proscribes the reversal by a court of appeals of a judgment *entered upon a jury verdict* on the ground that the verdict and judgment are against the weight of the evidence, except by the concurrence of all three judges of such court of appeals;

(b) Article IV, Section 6, Constitution of the State of Ohio does not proscribe and does permit the reversal by a court of appeals of findings and judgments *entered upon trial before either one judge or a three-judge trial court* by a majority (two judges) of a court of appeals on the ground that the findings and judgments are against the weight of the evidence;

(c) Although two judges of the three-judge state court of appeals herein held in their dissenting opinion that Petitioner's conviction was against the weight of the evidence, said judges joined in the affirmance of the verdict and judgment of conviction, ascribing as their reason therefor the requirement of their adherence to the aforesaid Ohio constitutional proscription against the reversal of a judgment *entered upon a jury verdict*, even though same is against the weight of the evidence, except by the concurrence of all three judges of a court of appeals;

(d) The classification which results from the provisions of Article IV, Section 6, Constitution of the State of Ohio, is arbitrary, unreasonable, capricious and unnatural in that it permits the reversal by a majority of a court of appeals on the weight of the evidence respecting cases tried before either one judge or a three-judge court, while proscribing such reversal with respect to a judgment entered upon a jury verdict?

2. Did not the Petitioner suffer an abridgment of his Fourteenth Amendment right to due process of law when a majority of the highest court of the State of Ohio in which a decision could be had in this matter held that Petitioner's conviction and the verdict and judgment of guilty herein were against the weight of the evidence, but that they could not reverse same by reason of the provisions of Article IV, Section 6, Constitution of the State of Ohio?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of Ohio, 1851.

ARTICLE IV, SECTION 6.

Court of Appeals.

"The state shall be divided into appellate districts of compact territory bounded by county lines, in each of which there shall be a court of appeals consisting of three judges. Vacancies caused by the expiration of the terms of office of the judges of the courts of appeals shall be filled by the electors of the respective appellate districts in which such vacancies shall arise. Until otherwise provided by law the term of office of such judges shall be six years. Laws may be passed to prescribe the time and mode of such election and the qualifications of such judges, and to alter the number of districts or the boundaries thereof, but no such change shall abridge the term of any judge then in office. The court of appeals shall hold at least one term annually in each county in the district and such other terms at a county seat in the district as the judges may determine upon, and the county commissioners of any county in which the court of appeals shall hold sessions shall make proper and convenient provisions for the holding of such court by its judges and officers. Each judge shall be

competent to exercise judicial powers in any appellate district of the state.

The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals, and courts of records inferior to the court of appeals within the district, and judgments of the courts of appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States or of this state cases of felony, cases of which it has original jurisdiction, and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court. *No judgment of any court of record entered on the verdict of the jury shall be set aside or reversed on the weight of the evidence except by the concurrence of all three judges of a court of appeals. Only a majority of such court of appeals shall be necessary to pronounce a decision, make an order or enter judgment, upon all other questions*; and whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. The decisions in all cases in the supreme court shall be reported, together with the reasons therefor, and laws may be passed providing for the reporting of cases in the courts of appeals. The chief justice of the supreme court of the state may assign any judge of the court of appeals to any county to hold court. The chief justice of the supreme court shall determine the disability or disqualification of any judge of the court of appeals. All laws now in force, not inconsistent herewith, shall continue in force until amended or repealed; provided, that all

cases, actions, or proceedings pending before or in any board, commission, officer, tribunal, or court on the first day of January, 1945, shall be heard, tried, and reviewed in the same manner and by the same procedure as is now authorized by law. (As amended November 7, 1944; effective January 1, 1945.)" (Emphasis added.)

Constitution of the United States.

AMENDMENT XIV.

(Rights of Citizens)

Sec. 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis added.)

Revised Code of Ohio, Section 2907.02. Arson.

"No person shall willfully and maliciously or with intent to defraud set fire to or burn or cause to be burned or aid or procure the burning of any dwelling house, kitchen, shop, barn, stable, or other outhouse that is parcel thereof, or belonging to or adjoining thereto, the property of himself or of another.

Whoever violates this section is guilty of arson, and shall be imprisoned not less than two nor more than twenty years."

STATEMENT OF THE CASE.

Petitioner was indicted for the offense of Arson, under Ohio Revised Code Section 2907.02, as set forth hereinabove, by the Grand Jury of Lake County, Ohio. The indictment appears on pages 20-21 of the appendix herein.

Thereafter, on May 20, 1964, Petitioner was found guilty of the alleged offense by a jury of twelve persons in the Court of Common Pleas, Lake County, Ohio, and was sentenced by said court on June 12, 1964, to serve an indeterminate term of Two to Twenty years in the Ohio Penitentiary (Appendix, pages 23-24).

The State's evidence as to Petitioner's perpetration of the act of arson alleged in the indictment was wholly and tenuously circumstantial. The primary state witness, who later in the course of the trial attempted to suborn perjury, offered exceedingly bizarre testimony to the effect that he had seen Petitioner in the vicinity of the burned premises at the approximate time of the act of arson, which, admittedly, someone had perpetrated. Reputable and independent defense witnesses, whose testimony was borne out by the business records of a large and non-interested janitorial supply firm, stated that Petitioner was in his office at the time of inception of the fire.

Petitioner effected appeal to the Court of Appeals for Lake County, Ohio (Seventh Ohio Appellate District). The matter was argued before said appellate court on October 9, 1964, and, by letter dated December 1, 1964, was ordered assigned for rehearing (Appendix, pages 24-25).

On March 8, 1965, the case was reargued before said court of appeals.

On September 21, 1965, judgment of the Court of Common Pleas was affirmed. The Memorandum Opinion of the Court of Appeals is set forth on pages 27-38, Appendix. One of the three judges of the court of appeals held

therein that he could not "say that the verdict is not sustained by sufficient evidence or is contrary to law" and that he would therefore affirm the judgment (Appendix, page 38). *Two of the three judges of the Court of Appeals held that they were of the opinion that the verdict and judgment were against the weight of the evidence, but that they were "required" to join in the affirmance because of the aforesaid provisions of Article IV, Section 6, Constitution of the State of Ohio.* (Appendix, page 38.)

Petitioner thereupon filed in said Court of Appeals an application for rehearing, alleging *inter alia* that the provisions of Article IV, Section 6 of the Constitution of the State of Ohio, upon which the two dissenting judges had based their joinder in the affirmance, deprived Petitioner of his Fourteenth Amendment rights to due process of law and to equal protection of the laws.

> "5. The provisions of Article IV, Section 6, Ohio Constitution which prohibits the setting aside or reversing of a jury verdict except by a concurrence of all three judges deprives Defendant-Appellant of his right to Due Process of Law under the provisions of the Fourteenth Amendment to the Constitution of the United States, and of equal protection of the laws as guaranteed thereby." (Appendix, page 26.)

The entire application for rehearing is set forth on pages 25-26, Appendix.

Rehearing was granted by entry dated October 6, 1965 (Appendix, page 39).

In this fashion Petitioner first raised the constitutional issues under the Fourteenth Amendment to the Constitution of the United States upon which he relies herein.

On November 8, 1965 the matter was argued on rehearing, primarily on the basis of abridgment of Four-

teenth Amendment rights, and on February 16, 1966, the Court of Appeals again affirmed the judgment and sentence (Appendix, pages 39-40).

Petitioner then filed his "Motion for Leave to Appeal" and his "Appeal as of Right" in the Supreme Court of Ohio, which court refused to accept jurisdiction of the matter as hereinabove stated.

The Court of Appeals for Lake County, Ohio (Seventh Ohio Appellate District) is thus the highest court of the State of Ohio in which a decision in this matter could be had.

REASONS FOR GRANTING THE WRIT.

QUESTION NO. 1.

The constitutional impropriety of and the lack of reason for that provision of Article IV, Section 6, Constitution of the State of Ohio which proscribes the reversal by a court of appeals of a judgment entered upon a jury verdict on the ground that same is against the weight of the evidence "except by the concurrence of all three judges of a court of appeals," is apparent from the following hypothetical situation under Ohio law:

A, B and C were arrested for having allegedly jointly perpetrated the offense of Arson. They were indicted jointly, but secured separate trials. Defendant A elected to be tried before a jury. Defendant B waived jury trial and elected to be tried before a single judge. Defendant C waived jury trial and was granted, upon request, a trial by a three-judge court. These several proceedings are made available under Ohio statutes, the allowance of a three-judge court being a discretionary matter following a request therefor by a defendant in a criminal matter.

Defendants A, B and C were each found guilty in

their separate trials in the same court and were each sentenced to an indeterminate term of Two to Twenty years in the Ohio Penitentiary. The same witnesses had been used against each of the three defendants in the course of their respective trials. The same evidence had been produced and the same testimony presented in each of the three trials. All three defendants effected their individual appeals to the same court of appeals, assigning as error the ground that the verdict and the findings were against the weight of the evidence. Two judges of the court of appeals found and expressed in their opinions relative to *each* of the three appeals the belief that the conviction therein was against the weight of the evidence

The case of B, who had been tried before a single judge, was reversed and remanded on the ground that the finding of the single trial judge and the judgment were against the weight of the evidence.

The case of C, who had been tried before the three-judge court, was reversed and remanded on the ground that the finding of the three-judge court and the judgment were against the weight of the evidence.

The case of A, who had been tried before a jury of twelve persons, was not reversed. Although the same two judges who had found the findings and judgments in the cases of B and C to be against the weight of the evidence similarly found that the verdict and judgment in A's case were against the weight of the evidence, and although they dissented with respect to the holding and opinion of the third judge of their court of appeals, they joined in his affirmance of the verdict and judgment respecting A by reason of their belief that the aforesaid provisions of Article IV, Section 6, Constitution of the State of Ohio required such affirmance even though the evidence was insufficient to sustain the verdict and judgment.

The Supreme Court of Ohio, as in this case, refused to accept jurisdiction of A's "Motion for Leave to Appeal" and his "Appeal as of Right" based, as in this case, upon the claim that his rights to due process and equal protection under the Fourteenth Amendment to the Constitution of the United States had been abridged by the provisions of Article IV, Section 6 of the state constitution, and by reason of the adherence to the provisions thereof by the several judges of the state court of appeals.

Defendant A was thus imprisoned in the Ohio Penitentiary under an indeterminate sentence of Two to Twenty years. B and C were thus enabled to again seek their vindication in second trials wherein it was imperative that the state's evidence be substantially stronger (if possible) than that presented at their first trials. Their opportunities for acquittal were thus infinitely greater than the opportunities therefor which had prevailed upon their first trials—and upon the trial of A.

Even more anomalous and legally disturbing is the situation which would prevail under such facts if the prosecuting attorney declined to retry B and C for lack of more substantial evidence than that presented at their first trials, or for any other reason—while A serves his indeterminate sentence of Two to Twenty years in the Ohio Penitentiary.

The foregoing situation cannot be consonant with the right to equal protection of the laws.

The intendment of Article IV, Section 6, of the Ohio Constitution to proscribe *only* the reversal of judgments entered upon jury verdicts by courts of appeals on the ground that same are against the weight of the evidence, except by the concurrence of all three judges, is apparent, for in the sentence immediately following such proscription, the following appears:

"Only a majority of such court of appeals shall be necessary to pronounce a decision, make an order or enter a judgment, upon all other questions; * * *."

An arbitrary, unnatural, capricious and unreasonable classification is thus established in regard to persons electing to be tried, respectively, before juries, single judges and three-judge courts. Courts which have been called upon to determine the propriety of such classifications have ruled adversely thereto on grounds of equal protection and due process.

In *Morton v. State*, 105 O. S. 366, 373, 138 N. E. 45 (1922), the defendant was denied the right to take out-of-state depositions because of the fact that he was, at the time of application therefor, confined in the County Jail awaiting trial. The governing statute provided that if, in the discretion of the trial judge, the out-of-state evidence sought to be secured appeared to be relevant, competent and material, the trial judge "shall" grant a commission to take such deposition, *provided, however, that the applicant was not at that time confined in prison.* If the applicant were in jail, he could not, by reason of such imprisonment, qualify under the statute for the granting of a commission to take out-of-state testimony.

The Supreme Court of Ohio held that the effect of the statute was to grant to the defendant who was able to give bail process of the court to secure evidence with which to defend himself, while depriving the defendant who was unable to afford bail of such privilege and of such means of defense. The Court stated, on page 373:

"* * * and thus it may well happen that of two defendants *jointly indicted for the commission of the same crime,* one under bond and the other confined in jail, the one under bond, availing himself of the rights conferred by the statute, may be able to estab-

lish his innocence by the deposition of witnesses residing without the state, while the other, confined in jail, and deprived of such testimony, may be found guilty because of such deprivation." (Emphasis added.)

The Court concluded with the finding that the statute, as amended, providing for the taking of depositions in criminal cases, was unconstitutional and resulted in an abridgment of the defendant's right to equal protection of the laws.

It is to be noted that the Court's example followed the same reasoning as that utilized in the A, B, C example set out hereinabove.

An Illinois statute was held by the Supreme Court of that state to be unconstitutional in *Sturges & Burn Mfg. Co. v. Pastel*, 301 Ill. 253, 133 N. E. 762 (1921). The offending statute had provided that persons who elected to be tried by jury or who waived jury trial in writing and submitted to trial before the court could be imprisoned upon non-payment of a fine or judgment. The Illinois Supreme Court, on page 256, pointed out that by the terms of the statute defendants who default, plead guilty or confess judgment cannot be imprisoned for non-payment of fine or judgment. This, the court held to represent an arbitrary discrimination which was utterly lacking in reason.

"There is no reason why a defendant who has had a jury trial and been unsuccessful in his defense should be subject to imprisonment for the payment of the judgment, and another defendant in exactly similar circumstances who has defaulted or confessed judgment for an exactly similar liability should be relieved from the imprisonment. * * * *The act may provide a jury trial, as stated in the title, but it is at the price of liability to imprisonment for an un-*

successful defense. Its effect is that a defendant cannot be imprisoned for the payment of a judgment if he suffers default, pleads guilty or confesses judgment; that he is entitled to a trial by jury, but that if he insists upon having one and fails in his defense he may be imprisoned for the fine and judgment in the case. The distinction is arbitrary and without reason. *A defendant who demands a jury trial ought not to enjoy such right under penalty of imprisonment if he fails to make good his defense.* The statute violates the constitutional provisions in regard to due process and equal protection of the laws." (Emphasis added.)

In *Berger v. City and County of Denver,* 142 Colo. 72, 77, 350 P. 2d 192 (1960), the Supreme Court of Colorado was called upon to decide the propriety of a system of sentencing for parking violations under which a One Dollar fine was imposed upon those who admitted their guilt and waived their right to appear in court and defend, while a greater fine was imposed upon those who elected to contest the issue and who were unsuccessful in their defense.

"The interpretation apparently indulged in by the trial courts amounts to a double standard where a citizen is assured of a definite penalty if he admits his guilt and pays promptly, but faces an uncertain fate if he dares invoke his right to trial. This we view to be a deprivation of the constitutional guaranty to each citizen of 'equal protection of the law.' "

The equal protection concept is grounded upon the basics of classification and natural mutuality of interest and/or identity.

"Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Hartford Steam Boiler Inspection and Insurance Com-*

pany v. Harrison, 301 U. S. 459, 81 L. ed. 1223, 57 S. Ct. 838 (1936).

Reasonableness in classification and the requisite lack of arbitrariness in regard thereto were considered by this Court in *Nicol v. Ames,* 173 U. S. 509, 43 L. ed. 786, 19 S. Ct. 522 (1898). It was held that:

> "The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, *based upon no real distinction and entirely unnatural.*" (Emphasis added.)

The Supreme Court of Ohio has, in the past, followed the principles of classification set forth above. *Bloomfield v. State,* 86 O. S. 253, 265, 99 N. E. 309 (1912), *State ex rel. Crotty v. Zangerle,* 133 O. S. 532, 11 O. O. 226, 228, 14 N. E. 2d 932 (1938).

Fundamental to constitutionally sanctioned classification is the requirement that the questioned statute or state constitutional provision affect all persons in the same class and under similar conditions. It must include all persons who naturally belong to the class. *Tanner v. Little,* 240 U. S. 369, 382, 60 L. ed. 691, 36 S. Ct. 379 (1915), *Gulf Coast & S. F. R. Ry. Co. v. Ellis,* 165 U. S. 150, 41 L. ed. 666, 17 S. Ct. 255 (1897).

The Respondent has cited *State ex rel. Bryant v. Akron Metropolitan Park District,* 281 U. S. 74, 74 L. ed. 710, 50 S. Ct. 228, 66 A. L. R. 1460, in purported refutation of the proposition advanced in this matter by Petitioner. This case does not appear to be sound authority for several reasons. First, there are implicit in Ohio law, the mechanics for correcting any unequal application of the Constitutional provision discussed in *Bryant.* Second, there is no clear-cut system of classification such as is prohibited by the equal protection concept. Third, there is no

assurance that this Court, using contemporary constitutional approaches, would sanction the matter if called upon to review it again.

It is submitted as manifest that persons who are found guilty in the Common Pleas Court of alleged felonious acts and who effect appeal to the appropriate Court of Appeals represent a narrow class within our society. It is submitted as evident that whether they were found guilty by a jury, by one judge, or by three judges, their interests, their requirements, and the legal problems confronting them are identical.

Their membership or placement in this narrow class is eminently reasonable, logical, and natural.

These considerations develop into a complete oneness with respect to A, B, and C, the hypothetical individuals jointly indicted and separately tried and convicted upon identical evidence for the same offense before a jury in A's case, one judge in B's case, and three judges in C's case.

To subclassify A, B, and C, and to afford two of them greater, more favorable, and more just appellate rights would appear patently discriminatory against A, whose case cannot be reversed by two court of appeals judges even though they find expressly that his conviction is against the weight of the evidence.

This is neither natural, reasonable nor just.

This appellant has been denied equal protection because he chose to be tried by a jury of his peers.

QUESTION NO. 2.

Regarding the abridgment of Petitioner's right to due process of law, it is submitted as antithetical to the due process concept that an individual be imprisoned or sentenced to imprisonment upon a conviction which two judges of a three-judge reviewing court exercising final jurisdiction over the matter expressly held to be against the weight of the evidence.

This unusual situation is even more perplexing when it is recalled that the two dissenting judges considered themselves to be *required,* despite their beliefs and analyses, to join in the affirmance of a verdict and judgment which should not have been returned in the first instance, this by reason of the provisions of Article IV, Section 6, of the Constitution of the State of Ohio which has been fully set forth hereinabove.

This Court has spoken of due process in terms of "those canons of decency and fairness which express the notions of justice of English-speaking peoples"; of immunities which "are so rooted in the traditions of our people as to be ranked as fundamental"; of immunities which are "implicit in the concept of ordered liberty"; of "methods that offend a sense of justice"; and of the "compendious expression for all those rights which the courts must enforce because they are basic to our free society." *Rochin v. People of California,* 342 U. S. 165, 169, 173, 96 L. ed. 183, 72 S. Ct. 205, 25 A. L. R. 2d 1396 (1951), *Wolf v. People of California,* 338 U. S. 25, 27, 93 L. ed. 1782, 69 S. Ct. 1359 (1949). Reconsideration of *Wolf* does not affect the significance of the concepts enunciated respecting the meaning of due process.

It would seem that the imprisonment of an individual upon a jury conviction which was not sustained by and was, in fact, against the weight of the evidence is a notorious abrogation of due process; is offensive to "those canons

of decency and fairness which express the notions of justice of English-speaking peoples"; is in derogation of those immunities which are "implicit in the concept of ordered liberty"; is destructive of those rights "* * * which the courts must enforce because they are basic to our free society"; and is grossly offensive to our sense of justice.

Thus, while the term "due process of law" is not susceptible of specific definition, and while such concept is not easily categorized, *Rochin v. People of California,* 342 U. S. 165, 173, 96 L. ed. 183, 72 S. Ct. 205, 25 A. L. R. 2d 1396 (1951), it is believed evident that due process of law does not contemplate imprisonment upon a jury conviction which is against the weight of the evidence.

While the abridgment of the right to due process of which Petitioner complains occurred in the course of appellate proceedings, it is fundamental that the right to due process is as valid and as crucial in the appellate phase of a proceeding as in the trial phase. *Frank v. Mangum,* 237 U. S. 309, 327, 59 L. ed. 969, 35 S. Ct. 582 (1915), *Cole v. Arkansas,* 333 U. S. 196, 201, 92 L. ed. 644, 68 S. Ct. 514 (1948).

It is submitted that appellate review is futile if its objectivity is so delimited as to require ratification in certain cases of trial proceedings which transgress against substantive legal proprieties and offend "against justice and those canons of decency and fairness which express the notions of justice of English-speaking peoples * * *."

It is submitted that Petitioner was denied due process of law by reason of the adherence by the two dissenting judges of the Ohio court of appeals to the provisions of Article IV, Section 6 of the Ohio Constitution under circumstances wherein such dissenting judges held that although the verdict and judgment were against the weight of the evidence, they were *required* nonetheless to affirm

same because of this incongruous state constitutional dictate.

The affirmance of Petitioner's conviction does violence to the due process concept as defined by this Court in its previous pronouncements relating thereto, and imposes upon this Petitioner, unless relief is afforded by this Court, the burden of imprisonment for an offense of which he should not have been convicted in the first instance.

CONCLUSION.

Petitioner submits that the affirmance of his conviction by two dissenting judges of a three-judge court of appeals, notwithstanding their expressed belief that such conviction was against the weight of the evidence, represents an abridgment of his Fourteenth Amendment rights to equal protection of the laws and to due process of law.

Petitioner urges upon this Court the fact that the provisions of Article IV, Section 6, Constitution of the State of Ohio, relating to reversal of judgments entered upon jury verdicts on the weight of the evidence except upon the concurrence of all three judges thereof is in conflict with the equal protection and due process clauses of Section One of the Fourteenth Amendment, and should be so declared by this Court.

WHEREFORE, Petitioner prays that a writ of certiorari issue from this Court to the Court of Appeals for Lake County, Ohio (Seventh Ohio Appellate District) and that he be given leave to present these matters on their merits.

Respectfully submitted,

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Petitioner Pro Se.

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LESTER W. DONALDSON,
Attorneys for Petitioner.

APPENDIX.

INDICTMENT.

COURT OF COMMON PLEAS

THE STATE OF OHIO, LAKE COUNTY, SS.

Of the Term January in the year of our Lord, one thousand nine hundred and sixty-four.

THE JURORS OF THE GRAND JURY of said County, on their oaths, in the name and by the authority of the State of Ohio, do find and present that Serrol Dubin late of said County, on or about the 5th day of August in the year of our Lord one thousand nine hundred and sixty-three at the County of Lake aforesaid, appeared as a witness in a proceeding being heard before Arson Investigator Harold D. Carter, said investigator having jurisdiction of said proceeding, and committed perjury by testifying an oath, lawfully administered, as follows: that during the late evening hours of August 4, 1963, and the early morning hours of August 5, 1963, he was not in the vicinity of a certain residence located at 32113 Vine Street, Willowick, Ohio, and that the only occasion of his being in the vicinity of said residence on said dates was when he arrived at said residence with his wife at approximately 1:45 a.m. on August 5, 1963, said testimony being material to the proceeding and said testimony being false in that the said Serrol Dubin, at approximately 12:05 A.M. or just prior to said time, was in the vicinity of the residence located at 32113 Vine Street in Willowick, Ohio, Contrary to Section 2917.25 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

SECOND COUNT: And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said Serrol Dubin,

late of said Lake County, on or about the 4th day of August in the year of our Lord, one thousand nine hundred and sixty-three at the County of Lake aforesaid, committed arson by burning with intent to defraud the dwelling house of Mary S. Dubin, Serrol James Dubin, Serrol Dubin and Margaret Ann Dubin, Contrary to section 2907.02 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

THIRD COUNT: And the Jurors of the Grand Jury aforesaid at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said Serrol Dubin late of said Lake County, on or about the 4th day of August in the year of our Lord one thousand nine hundred and sixty-three at the County of Lake aforesaid, wilfully and maliciously attempted to burn the dwelling house of Mary S. Dubin, Serrol James Dubin, Serrol Dubin and Margaret Ann Dubin, Contrary to Section 2907.06 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

/s/ FRED V. SKOK,
Prosecuting Attorney.

NOLLE PROSEQUI.

This day, to-wit: March 23, 1964, came the Assistant Prosecuting Attorney on behalf of the State of Ohio and with leave of Court and for good cause shown pursuant to the record herein taken, entered a Nolle Prosequi on the first count of the within indictment.

/s/ W. SLOCUM,
Judge.

Approved:
/s/ DAVID P. FREED,
Assistant Prosecuting Attorney.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

The within cause came on to be heard upon the defendant's motion to quash count No. 3 of the indictment or, in the alternative, to require the Prosecuting Attorney to elect upon which count he will proceed.

The Court finds the alternative motion to require the Prosecuting Attorney to elect upon which count he will proceed to be well taken. The Court further finds that the Prosecuting Attorney elects to proceed upon count No. 2, to-wit: Arson.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the within case will proceed to jury trial on May 11, 1964, upon the second count of the within indictment, to-wit: Arson.

It is so ordered.

/s/ W. S. SLOCUM,
Judge.

Approved:
/s/ DAVID P. FREED,
Assistant Prosecuting Attorney.

VERDICT.

We, the Jury in this case, duly impaneled and sworn, find the defendant, Serrol Dubin, Guilty of Arson, in manner and form as he stands charged in the indictment.

Dated May 20, 1964.

1. Frank Repasi
2. Margaret Rose Rider
3. Ruth A. Milner
4. Carol K. Searles
5. Harry F. Stopar
6. Norma Tuisku
7. Evelyn G. Brichford
8. Edward A. Robinson
9. Richard C. Smith
10. Anna L. Miller
11. Evelyn Polburn
12. William M. Flynn

/s/ W. S. SLOCUM,
Judge.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

This day, to-wit: June 12, 1964, came the Assistant Prosecuting Attorney on behalf of the State of Ohio and the defendant, Serrol Dubin, being in Court represented by his attorney, Lester W. Donaldson, Esquire, and the cause came on for hearing on the matter of sentencing, the defendant having been convicted of the offense of Arson by jury trial on May 20, 1964.

The Court then asked the defendant if he had anything to say why judgment and sentence should not be pronounced against him and the defendant having nothing to say other than that which he has already said.

WHEREFORE, IT IS ORDERED that the defendant, Serrol Dubin, be sentenced to an indeterminate term of Two to Twenty Years in the Ohio State Penitentiary at Columbus, Ohio. It is further ordered that the defendant pay the costs of this prosecution taxed at $---------- for

which execution is hereby awarded. This sentence is imposed under and by virtue of Section 2907.02 of the Revised Code of Ohio.

Exceptions are noted for the defendant.

It is further ordered on the oral motion of counsel for the defendant that execution of the sentence imposed herein be suspended during the pendency of the appeal of the defendant. It is further ordered that bond in the within case be continued at $4,000.00 and that bond set and posted in Case No. 5534 of the criminal docket of this Court be ordered to serve as bond in the within case.

/s/ W. S. SLOCUM,
Judge.

LETTER ORDERING REHEARING.

COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT

Youngstown, Ohio

December 1, 1964.

Mr. Guy J. McDermott,
Clerk of Courts,
Lake County Courthouse,
Painesville, Ohio.

Re: State of Ohio, Plaintiff-Appellee, v. Serrol Dubin, Defendant-Appellant. Case No. 757

To the Clerk of Courts:

By direction of the Court you are hereby authorized to and please will enter on the docket (not journal) of the Court of Appeals the decision of this Court in the above captioned case as evidenced by the following entry:

"December 2, 1964. The docket entry heretofore made by this court on the 9th day of October, 1964, is vacated and set aside and said cause is ordered assigned for rehearing."

Yours very truly,

PAUL W. BROWN,
JAMES G. FRANCE,
GEORGE M. JONES,
Judges.

APPLICATION FOR REHEARING.

Serrol Dubin, Defendant-Appellant in the above matter, herewith applies for a rehearing thereon in this Court.

Defendant-Appellant predicates his application for rehearing upon the following bases:

1. Defendant-Appellant filed his motion for new trial within the statutorily prescribed period following the verdict herein, assigning, among other reasons therefor, the fact that the verdict is not sustained by sufficient evidence.

2. The trial judge overruled the motion of Defendant-Appellant for a new trial.

3. Defendant-Appellant, in his brief heretofore filed in this Court ascribed as error, in his "Fourth Assignment of Error," the fact that the trial judge had overruled his motion for new trial.

4. Two judges of this Court, having stated in their dissenting opinion that they "are of the opinion that the verdict and judgment thereon are against the weight of the evidence," it is submitted that this matter should be reversed by two judges of this Court, by reason of the error committed by the trial judge

in overruling Defendant-Appellant's motion for new trial, said motion having been based in part upon the ground that the verdict was not sustained by sufficient evidence.

5. The provisions of Article IV, Section 6, Ohio Constitution which prohibits the setting aside or reversing of a jury verdict except by a concurrence of all three judges deprives Defendant-Appellant of his right to Due Process of Law under the provisions of the Fourteenth Amendment to the Constitution of the United States, and of equal protection of the laws as guaranteed thereby.

Defendant-Appellant requests that he be afforded an oral hearing hereon and that he be privileged to thus present to the Court argument and law in substantiation of this application.

SERROL DUBIN,
Defendant-Appellant,

JAMES J. CARROLL,
Attorney for the Defendant-Appellant,

DONALDSON AND COLGROVE,
LESTER W. DONALDSON,
Attorneys for the Defendant-Appellant.

MEMORANDUM OPINION OF COURT OF APPEALS.

(Dated: September 21, 1965.)

LYNCH, J.

This is an appeal on questions of law from the conviction of defendant-appellant in the Common Pleas Court for arson.

Defendant-appellant has submitted four assignments of error, but the third assignment of error contains the substance of his appeal, which is that the verdict of guilty in this case is contrary to the manifest weight of the evidence.

The evidence is undisputed that a fire of incendiary origin occurred at the residence located at 32113 Vine Street, Willowick, Ohio, sometime in the late evening hours of August 4, 1963, and the early morning hours of August 5, 1963. The testimony of Harold D. Carter, Arson Investigator for the State of Ohio Arson Bureau, Division of State Fire Marshal (R. 378-419, 460-461) and Patrolman William E. LeMaster of Willowick (R. 359-377) indicated that the fire had at least three separate points of origin, namely: (1) center of hallway about three or four feet from the living room, caused by a flammable liquid accelerant placed on floor, (2) southwest bedroom, and (3) northeast bedroom. On the floor in the southwest bedroom were found a gasoline can and a pour spout, and a book of matches which Serrol James Dubin, the occupant of the house, stated were not present in the house when he left for a vacation (R. 140-143, 161).

In the northeast bedroom was found a laundry basket with some articles of clothing that had an odor similar to that of gasoline. Howard C. Prisk, Chief Chemist for the

Ohio Department of Liquor Control, examined this clothing and found that it contained gasoline (R. 498).

Betty Jane Cornelius, a neighbor, testified that in the evening of August 4, 1963, while in her house watching TV, she heard voices and glass breaking from the property at issue. She walked to her sun porch and saw a fire in said house. She also saw the form of a person going into the driver's side of a car parked at the side of said house and saw the headlights of this car backing out the driveway at the side of said house toward Vine Street (R. 27-29, 36-41).

The fire was first reported to the police at 12:14 a.m., August 5, 1963 (R. 122).

At the time of the fire, this property belonged to Mary Dubin, defendant's wife. The property had been deeded to defendant and his wife in 1958, but in 1960 defendant deeded the property to his wife. At the time of the fire there was a mortgage on the property with the St. Clair Savings and Loan Association, with a balance due of $11,715.41 (R. 343).

At the time of the fire, there was a fire insurance policy on this property with the Fireman's Fund Insurance Company in the names of defendant and his wife in the amount of $12,000.00 (R. 328-330, 676-679). A claim was filed against the fire insurance company by defendant and his wife for this fire for the sum of $7,111.02 (R. 340, 344).

At the time of the fire, the house at 32113 Vine Street was being occupied as a residence by the son of defendant, Serrol James Dubin, the son's wife, and the son's minor daughter; however, at the time of the fire, Serrol James Dubin and his wife and daughter were away on vacation. Defendant knew that his son and his son's family was away on a vacation at the time of the fire (R. 161).

There was evidence in this case from which an infer-

ence could be made that this fire was set by a person familiar with this property and its occupants. Ernest Kellner, Chief of the Willowick Fire Department, stated this was the only fire of incendiary origin within a radius of a half mile of the Dubin residence that occurred during the year preceding this fire (R. 233, 237-239).

Serrol James Dubin testified that before he left on his vacation he secured the two doors of this house which had locks (R. 137). After the fire, the first persons to arrive at the scene were two neighbors, Clifford Webb and Richard L. Weber, who found that the two doors to the house were locked and they forced both doors open to see if anyone was inside the house (R. 53-54, 61).

This fire occurred on a warm, clear summer night. Neighbors such as Mr. and Mrs. Clifford Webb and Mr. and Mrs. Richard L. Weber were sitting in their backyards talking together and were just returning to their homes when they noticed this fire. Another neighbor, Betty Jane Cornelius, was watching TV. Her sun-room door was open and she heard voices and glass breaking from the Dubin property. Betty Jane Cornelius' testimony would indicate that she heard the voices of the persons who set this incendiary fire as they were leaving the scene. However, none of the neighbors saw or heard the persons who set this fire either entering this house or in the act of setting this fire. Thus, the person, or persons, who perpetrated this incendiary fire were able to enter this property in the dark, spill gasoline at three separate places in the house, and set fire at all three places without attracting the attention of any of the neighbors. The timing and circumstances of this incendiary fire are such as to create the inference that the person, or persons, who set it were sufficiently familiar with this property that they knew that it was unoccupied and that they would be able to set

fire to this building in the manner aforesaid without attracting the attention of the neighbors.

The decisive question in this case revolves around the whereabouts of the defendant between approximately 11:30 p.m., August 4, 1963, and 1:00 a.m., August 5, 1963. The testimony of both defendant and his wife is that he was at his residence at 4511 University Parkway, University Heights, immediately prior to this time, and that at 11:25 to 11:30 p.m. defendant left his residence and drove away in his 1963 Cadillac Coupe DeVille, which is palomino or light brown in color, and which has the license number RR888. He returned to his residence in the same car sometime between 12:30 a.m. and 1:00 a.m. (R. 172-174, 176, 440, 442-444, 449, 604-607, 616-617, 704-706).

Mr. Carter drove the distance from the scene of the fire to defendant's residence in thirty-five minutes (R. 475-477).

The key witness from the State was Lawrence Searles, age 21, owner of ABCO Answering and Secretarial Service, which is located at 36001 Euclid Avenue, Willoughby, Ohio. Mr. Searles was scheduled to work as a night switchboard operator from 12:15 a.m. to 8:15 a.m. the morning of August 5, 1963. While driving east on Vine Street in Willowick, enroute to work, approximately at 12:02 a.m., Mr. Searles saw a late model light colored Cadillac, with its parking lights on, parked in the east right lane of Vine Street against the curb, approximately five hundred feet from Thirty-Second Street, with two male persons in the parked car. Mr. Searles thought that the persons in the Cadillac might be in distress and needing assistance, so he drove about 1500 to 2000 feet beyond the Cadillac, pulled into the parking lot of St. Mary Magdalene Church, which is on the south side of Vine Street, turned around and stopped as he was headed towards Vine Street. While

Mr. Searles was so parked, he looked to his left and saw that the Cadillac had started to move slowly forward, and it passed his car. The Cadillac was going about ten to fifteen miles an hour in the curb lane when it passed Mr. Searles' car. Mr. Searles then drove into Vine Street and continued east in the parking lane. He took note of the license number of the Cadillac as RR 888. Mr. Searles followed the Cadillac to the intersection of Willowwick Drive and Vine Street where both cars stopped for a red light. The Cadillac was still in the curb lane, and Mr. Searles' automobile was in the passing lane with his front bumper approximately at the edge of the back window of the Cadillac. The light conditions were good at the intersection. Mr. Searles observed that the driver and the passenger in the Cadillac were talking, that the passenger turned towards him and then turned away and said something to the driver, who started to turn towards Mr. Searles. Mr. Searles saw the left hand side of the driver's face for about one second. He saw the driver of the Cadillac for approximately 20 to 25 seconds until the traffic light turned green, at which time the driver of the Cadillac looked forward again and proceeded to turn right onto Willowick Drive. Mr. Searles continued east on Vine Street to his answering service where he arrived at approximately 12:13 a.m. Mr. Searles identified the driver of the Cadillac by pointing to defendant Serrol Dubin in the courtroom (R. 240-242, 244-254, 278-281, 285-292, 299, 321-322).

Shortly after Mr. Searles arrived at his answering service, he heard the fire alert siren. Mr. Searles also has part-time employment as a news reporter with the United News of Northeastern Ohio, which renders news services to radio and television stations. He telephoned the Willowick Police Department to learn the location of the fire,

notified two of his camera men to go to the scene of the fire, made arrangements for another person to watch the switchboard, and drove to the scene of the fire. While at the scene of the fire, later in the morning, he noticed a light colored, late model Cadillac with the license number RR 888 which he had seen earlier that evening. Mr. Searles walked over to the Cadillac in which there was a male driver and a female passenger. Upon inquiry, the driver stated that he was Dubin, the owner of the house that was burned. Mr. Searles again identified this driver in the Cadillac as defendant Serrol Dubin. Mr. Searles then notified the Chief of the Fire Department that he had seen the Cadillac with the same driver earlier that same evening, before the fire started (R. 255-258, 263-266).

On the evening of August 5, 1963, around 7:30 p.m., Mr. Searles went to the Willowick Police Department and was asked to view several people, which he did, and he identified the defendant, Serrol Dubin (R. 268, 304-307, 471-475).

To establish a motive for defendant to set this fire, the State presented the testimony of John B. McClure, a real estate appraiser, who estimated that this property prior to the fire was worth $15,250.00, and that after the fire it was worth $16,500.00. He explained that the property was worth more after the fire because this property was commercially zoned and could then be put to a commercial use (R. 507).

Defendant presented testimony that this house could have been moved prior to the fire to a vacant lot about a quarter of a mile away for approximately $4,100.00. The lot would cost between $1,200.00 and $1,500.00. The cost of the foundation, grading, connecting the utilities and making the house liveable would cost approximately $2,100.00 to $2,200.00. The total cost to relocate the house

would be approximately $7,700.00, and the relocated house would be worth between $13,500.00 to $14,500.00 at the new location (R. 535-539, 543-545).

Defendant filed a notice of alibi in which he stated that at the time the State of Ohio claims that he was in the vicinity of the residence at 32113 Vine Street, Willowick, at or about 12:05 a.m. on the morning of August 5, 1963, he was actually in his office at 15925 Euclid Avenue, East Cleveland, Cuyahoga County, Ohio.

The defendant gave a statement to Mr. Carter, under oath, which was recorded on a tape recorder and was played in the presence of the Court and jury. In this statement the defendant stated that he left his residence about 11:20 to 11:30 p.m. and drove to his office to check on some cleaning that was done there and to organize the work for his secretary, who had been away on a vacation for a week. He said that he had not met or talked to anyone while at his office. He left the office about 12:30 a.m. and drove to the Cedar Bowling Center, looked in, and then drove home where he arrived about 1:00 a.m. (R. 444-450.)

At the trial defendant testified as follows: He arrived at his office at approximately 11:30 p.m. He turned on the lights, checked to see whether the cleaning was done, and was getting things ready for his secretary when he heard a noise at the front door between 11:35 to 11:40 p.m. He went to the front door, and Mr. and Mrs. John Fridley were there and wanted to see him. Defendant let them in, and they told him they wanted the job of maintenance of the building. Defendant took them around the building and showed them what had to be done. Defendant agreed to try them out for a month for $30.00 a month. Mr. Fridley said that he needed some supplies, and defendant authorized him to order the supplies. Mr. and Mrs. Frid-

ley left between 12:15 a.m. and 12:30 a.m. Shortly afterwards, defendant left the office and arrived home between 12:30 and 1:00 a.m. (R. 608-611, 616-617.)

Defendant and Mr. Fridley both testified that since approximately six months prior to the night of August 4, 1963, Mr. Fridley had been attempting to obtain the job of the maintenance of defendant's office building. (R. 570-571, 671.)

Mr. and Mrs. Fridley corroborated defendant's testimony as to meeting him at his office on the night of August 4, 1963. Mr. Fridley testified that as a result of this meeting he contacted a salesman with the State Chemical Company about 8:00 a.m. on the morning of August 5, 1963, and ordered supplies which were delivered to defendant's building. (R. 555-576, 580-584.)

Mrs. Fridley testified that she saw an article in the newspaper about one week after the fire and recalled the meeting in defendant's office on the night of the fire, and that she told her husband, who in turn told defendant. (R. 574-575, 590, 743.)

The problem in this case is that the testimony of Lawrence Searles, who positively identified defendant as being in the vicinity of the scene of the fire at approximately 12:02 a.m. August 5, 1963, and the testimony of defendant and Mr. and Mrs. Fridley to establish defendant's alibi that at that time defendant was at his office in East Cleveland can not be reconciled. Some one is either mistaken or is not telling the entire truth.

Defendant's statement to the state arson investigator and his testimony at the trial would give the jury reason to question his credibility on this issue. His self-interest is obvious; in his statement to the state arson investigator approximately eighteen hours after the fire, defendant did not mention anything about a meeting with Mr. and Mrs.

Fridley the night before even though he was specifically asked if he had met or talked with anyone at his office; on cross-examination he was evasive on such obvious facts as ownership of this property, existence of a fire insurance policy in the names of defendant and his wife and the fact that a claim was filed on such policy and he was something less than truthful on his version of his prior conviction of possession of obscene pictures. (R. 676-684, 708-712, 716-723, 753, 761, 825-832.)

The difficult part of this case concerns the testimony of Mr. and Mrs. Fridley. The evidence indicates that there had to be some contact with defendant and Mr. and Mrs. Fridley prior to the morning of August 5, 1963, because the evidence is clear that on the morning of August 5, 1963, Mr. Fridley ordered cleaning supplies on behalf of defendant for defendant's office building. However, Mr. and Mrs. Fridley's testimony can not be reconciled with the testimony of Lawrence Searles on the time of the meeting of Mr. and Mrs. Fridley with defendant. Assuming that Lawrence Searles and Mr. and Mrs. Fridley are attempting to tell the truth, someone is mistaken. The jury, by the verdict, believed Lawrence Searles and apparently thought Mr. and Mrs. Fridley were mistaken as to the time of their meeting with defendant. In other words, the jury could have believed that Mr. and Mrs. Fridley actually met and talked with defendant as they said they did, but that this meeting took place at some time other than between 11:30 p.m. August 4, 1963, and 12:15 and 12:30 a.m. August 5, 1963, such as Saturday, August 3, 1963, as suggested by the attorney for the State.

State v. Reid, 3 Ohio App. (2nd) 215 (August 23, 1965, issue of Ohio Bar) is the most recent Ohio case on appellate review on the weight of evidence in a criminal case. A pertinent excerpt from page 221 of Judge Guernsey's opinion is as follows:

"It is the duty of this court in reviewing a case upon the weight of the evidence to determine whether the verdict is supported by the degree of proof which the character of the case requires, and to render its judgment according to such determination. In reviewing a criminal case upon the weight of the evidence this Court owes a greater duty than to determine merely whether there was 'some evidence' tending to support the verdict. In such situation if we are unable to determine from the record wherein the truth lies between conflicting evidence, we may well adopt the conclusion of the jury and the trial court, they being in a better situation to judge of the truth by reason of their opportunity to see the witnesses and observe their conduct. But where the truth is manifest upon the record itself, by reason of the absence of conflict, or by any other sound reason, we cannot escape our duty to determine whether the verdict and/or judgment is supported by the degree of proof which the character of the case requires. Cooper v. State (1930), 121 Ohio St. 562."

In a criminal case, a verdict of guilty is authorized only when the evidence produced establishes the guilt of the accused beyond a reasonable doubt. This does not mean that the reviewing court must be convinced beyond a reasonable doubt of the guilt of defendant below. The legal requirement is that the evidence to convict must be of such a nature that its very character is sufficient to satisfy reasonable minds of the guilt of the defendant. It is the province of the jury to determine the credibility of the witnesses. It may disbelieve, or believe, any testimony given at the trial. The question of belief rests with the jury, and it is reversible error for a reviewing court to substitute its own opinion for that of the jury. The reviewing court must not invade the province of the jury as to the credibility of the witnesses, no matter how con-

flicting the evidence is, providing its weight is sufficient under the rules of criminal law to sustain the verdict of conviction. It is the function of the jury, where the evidence is conflicting, to weigh, and, by so doing to determine where the truth lies. *Sandoffsky v. State,* 29 Ohio App. 419, 163 N. E. 634. See also *Atkins v. State,* 115 Ohio St. 542.

In determining whether evidence is sufficient to go to the jury and to sustain its finding of guilt, it has been said that the test is whether, taking the view most favorable to the prosecution's case, a reasonably minded juror could accept the relevant evidence as adequate to support the conclusion of defendant's guilt beyond a reasonable doubt. *Riggs v. United States* (C. A. 5, Fla.), 280 F. (2nd) 949; *Lambert v. United States* (C. A. 5, Ala.), 261 F. (2nd) 799. See *State v. Axe,* 118 Ohio St. 514.

The first syllabus of *State v. Salyer,* 48 Ohio Law Abstract 385, is as follows:

> "In a trial of a criminal action, the fact that there is a direct conflict in the evidence does not prevent the jury, or the court as the trier of the facts, from finding defendant guilty, as charged beyond a reasonable doubt."

I have examined the record and reviewed the evidence with considerable care and with special reference to the assignment of errors of defendant.

In my opinion the case was fairly and thoroughly tried. Counsel for both sides and the trial judge ably performed their respective roles in the trial of this case.

In my opinion there was sufficient competent evidence which, if believed, was proof of all the essential elements of the crime charged in the indictment, and would convince a reasonably minded person of the defendant's guilt beyond a reasonable doubt. The issue was

one of fact which was properly submitted to the jury for determination. The jury resolved this issue against the defendant. I cannot say that the verdict is not sustained by sufficient evidence or is contrary to law. I would affirm the judgment.

Approved:
/s/ JOHN J. LYNCH,
Judge.

Johnson, P. J., Dissents.
Jones, J., Dissents.

JOHNSON, *P.J.*, and JONES, *J.*, Dissenting.

We are of opinion that the verdict and judgment thereon are against the weight of evidence. However, Ohio Constitution Article IV, Section 6 (effective January 1, 1945), prohibits the setting aside or reversing of a jury verdict except by a concurrence of all three judges of a court of appeals. We are, therefore, required to join in the affirmance of the order appealed to this Court.

Approved:
/s/ NILS P. JOHNSON,
/s/ GEORGE M. JONES,
Judges.

JOURNAL ENTRY OF THE COURT OF APPEALS.

This day, the application of the defendant for a Rehearing is hereby allowed. Rehearing with fifteen minutes per side to be November 8, 1965, at 1:30 P.M. in Lake County, Painesville, Ohio.

/s/ NILS P. JOHNSON,
Judge,

/s/ GEORGE M. JONES,
Judge,

/s/ JOHN J. LYNCH,
Judge.

JOURNAL ENTRY OF THE COURT OF APPEALS.

This appeal on questions of law came on for hearing upon the Assignments of Error, the transcript of the docket and the Journal Entries of the Court of Common Pleas for Lake County, the original papers filed in said Court including the Bill of Exceptions, and was briefed and argued by counsel, and upon due consideration the Court finds no error prejudicial to Defendant-Appellant.

The cause also came on for hearing on the application of the Defendant-Appellant for re-hearing and the briefs and oral arguments of Counsel, and upon due consideration the Court finds that said application is not well taken.

IT IS THEREFORE, ADJUDGED AND DECREED by this Court that the judgment and sentence of the Court of Common Pleas for Lake County be, and the same are, hereby affirmed.

IT IS FURTHER ORDERED that the Appellee recover its costs herein taxed at $_____.

IT IS FURTHER ORDERED that a special mandate issue to the Court of Common Pleas for Lake County to carry the judgment and sentence of said Court into execution. It is further ordered that the application of the Defendant-Appellant for rehearing be, and hereby is, denied.

Exceptions are noted for Defendant-Appellant.

/s/ NILS P. JOHNSON,
/s/ GEORGE M. JONES,
/s/ JOHN J. LYNCH,
Judges of the Court of Appeals.

ENTRY OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL AS OF RIGHT.

(September 21, 1966.)

This cause, here on appeal as of right from the Court of Appeals for Lake County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lake County for entry.

ENTRY OF THE SUPREME COURT OF OHIO OVERRULING PETITIONER'S MOTION FOR LEAVE TO APPEAL.

(September 21, 1966.)

It is ordered by the Court that this motion is overruled.

ENTRY OF THE SUPREME COURT OF OHIO SUSTAINING RESPONDENT'S MOTION TO DISMISS APPEAL AS OF RIGHT.

(September 21, 1966.)

It is ordered by the Court that this motion is sustained.

SUPREME COURT, U. S.

FEB 15 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 853.

SERROL DUBIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, LAKE COUNTY, OHIO (SEVENTH OHIO APPELLATE DISTRICT).

BRIEF OF RESPONDENT IN OPPOSITION.

FRED V. SKOK,
Prosecuting Attorney of Lake County,

DAVID P. FREED,
Special Assistant Prosecuting Attorney,
Lake County Courthouse,
Painesville, Ohio,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0547

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Constitution of Ohio:

Art. I, Sec. 5 ..... 3, 6

Art. IV, Sec. 6 ..... 2, 3

Constitution of the United States:

Fourteenth Amendment 2

Statutes.

Ohio Revised Code:

Sec. 2311.04 ..... 3, 6

Sec. 2945.05 ..... 3, 6

Sec. 2945.06 ..... 3, 7

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 853.

SERROL DUBIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, LAKE COUNTY, OHIO (SEVENTH OHIO APPELLATE DISTRICT).

BRIEF OF RESPONDENT IN OPPOSITION.

STATEMENT OF THE CASE.

Respondent agrees with petitioner's statement of the case, but objects to the argumentative manner in which petitioner inserts *facts* into this statement. Petitioner characterizes the State's evidence as "* * * wholly and tenuously circumstantial." (See page 7 of the Petition.) Petitioner characterizes the testimony of a State's witness as being "* * * exceedingly bizarre." (See page 7 of the Petition.)

In presenting the questions to this Court, it was unnecessary for petitioner to allude to the evidence. The issue concerns appellate procedure under the Constitution of the State of Ohio. The evidence was so "wholly and tenuously circumstantial" and the testimony so "exceedingly bizarre" that a jury of twelve of defendant's peers

returned a unanimous verdict of "guilty" (page 23 Appendix to Petition) and the trial judge entered a judgment of imprisonment upon said verdict. (Page 23 Appendix to Petition.)

ARGUMENT.

QUESTION NO. 1.

Petitioner would have this Court declare Article IV, Section 6, Constitution of the State of Ohio (1851), unconstitutional as being repugnant to the equal protection of laws provision of the Fourteenth Amendment to the Constitution of the United States. The State Constitution prohibits the Court of Appeals from setting aside or reversing a judgment of a court of record upon the weight of the evidence except by the concurrence of all three judges of the Court of Appeals (See Article IV, Section 6, Constitution of the State of Ohio at page 4 of the Petition). The Supreme Court of Ohio as recently as 1961, reversed a Court of Appeals' decision in which the Court of Appeals, by vote or two to one, reversed a trial court where said appellate reversal was upon the weight of the evidence and the judgment of the trial court was entered upon the verdict of a jury. *State vs. Pope,* 171 Ohio St. 439 (1961).

Petitioner suggests that this provision of the Ohio Constitution results in a classification that is arbitrary, unnatural, capricious and unreasonable. The Ohio Constitutional provision is limited in its application and thus classifies all defendants who come before the criminal bar. It is necessary to examine the basis of the classification. The Ohio Constitutional proscription is limited to cases in which the Court of Appeals is weighing the evidence in a case where a verdict was returned by a jury. The task of weighing evidence is not one of those tasks that through-

out the growth and development of the law has been placed exclusively within the province of judges. On the contrary, the task of weighing evidence is left almost exclusively in the hands of juries. There are rare instances in the law where factual determinations are made by judges. The bulk of factual findings in the law are made by those unschooled in the profession of the law. The exceptions to this rule are in matters where fines, sentences and amounts of money involved in litigation are insubstantial. In these cases, our laws permit judges to make factual determinations in spite of a Constitutional provision guaranteeing the right to trial by jury. (Appendix: Constitution of Ohio, 1851, Article I, Section 5.) Under modern codes, judges in equity jurisdiction call juries to determine questions of fact in traditional equity cases. (Appendix: Section 2311.04 Revised Code of Ohio.) Under the Ohio law, all persons accused of committing a crime have a right to be tried by a jury. Under Section 2945.05 of the Revised Code of Ohio (Appendix), the accused may waive this right but only by explicitly following the procedures set forth in the statute. (Appendix: Section 2945.06 of the Revised Code of Ohio.) The question of waiver is solely in the hands of the accused and he may withdraw his waiver at any time prior to the commencement of his trial. (Appendix: Section 2945.05 Revised Code of Ohio.) After indictment and before trial, petitioner herein stood in precisely the same position in law as every other person in the State of Ohio that is charged with the commission of a crime. Does Article IV, Section 6 of the State Constitution classify in an arbitrary, unnatural, capricious and unreasonable manner? This Constitutional provision is founded in the belief by the people of the State that jury factual findings should not be disturbed by judges unless there be unanimity of the judges

on review. The principle takes its roots in the Constitutional guarantee of trial by jury and in the Common Law concept that pure questions of fact may be more ably determined by laymen than judges. The people of the State of Ohio in constitutionally allocating the judicial powers of government have indicated that questions of fact determined by laymen shall be given more weight on judicial review than where judges make the initial determination of fact. This concept is natural and reasonable.

In his concurring opinion in the case of *Griffin vs. Illinois*, 351 U. S. 12, 100 L. Ed. 891, 76 Sup. Ct. 585 (1956), Mr. Justice Frankfurter stated the matter as follows, at page 21 of United States Report of the case:

> "Nor does equal protection of the laws deny a State the right to make qualifications in law when such qualifications are rooted in reason."

The qualification of the State Constitution not only is rooted in reason but is based upon the guarantee of a right to trial by jury contained in another provision of the very Constitution that petitioner seeks to invoke.

The petitioner was convicted by a jury, i.e. twelve triers of the fact. Two judges on the Court of Appeals have disagreed with this verdict. However, two judges, including the one present at the trial, have held that the verdict was reasonable. The situation presented by a jury verdict with fourteen people agreeing with petitioner's conviction has many differences, not the least of which is numerical, from the situation where a defendant is convicted only by a trial judge or a three-judge court. In the latter case a question in the minds of at least two reviewing judges of the Ohio Court of Appeals would seem a rational basis for reversal.

The State Constitutional provision does not deny to petitioner equal protection under the laws.

QUESTION NO. 2.

Petitioner suggests that the three judge concurrence doctrine of the State Constitution offends the due process clause of the United States Constitution. Petitioner evidently believes that the due process clause of the Federal Constitution requires that an appeal be permitted in State Court criminal cases. This is not so. The Federal Constitution does not require that the States afford a defendant an appeal from a criminal conviction. *McKane vs. Durston*, 153 U. S. 684 (1894). It follows that if a State may constitutionally deny an appeal completely, it can impose restrictions on an appeal that may be granted.

Petitioner argues that to imprison a man in a case wherein the verdict is against the weight of the evidence is repugnant to the due process clause. This is, of course, a truism, but points out the circular nature of petitioner's reasoning. Under Ohio Law a verdict is not against the weight of the evidence, unless the trial judge or three judges of the Court of Appeals determine it so to be. The three judges of the Court of Appeals signed the journal entry of that Court in affirming the judgment below. (See: Petition for Certiorari at pages 39 and 40.)

The same argument presented under Question No. 1 as to the reasonable and natural basis for the sanctity of jury findings is adopted in support of the due process argument herein.

There is no debatable issue for this Court to review under the United States Constitution.

It is respectfully submitted that petitioner's Petition for Writ of Certiorari be denied.

FRED V. SKOK,
Prosecuting Attorney,
DAVID P. FREED,
Special Assistant Prosecuting Attorney,
Counsel for Respondent.

APPENDIX.

Constitution of Ohio, 1851, Article I, Section 5.
(Trial by Jury; Reform in Civil Jury System.)

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury. (As amended September 3, 1912.)"

Revised Code of Ohio, Section 2311.04.
(Trial of issues.)

"Issues of law must be tried by the court, unless referred as provided in sections 2315.26 to 2315.36, inclusive, of the Revised Code. Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference is ordered as provided in such sections.

All other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by a jury, or referred."

Revised Code of Ohio, Section 2945.05.
(Defendant may waive jury trial.)

"In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: 'I _____, defendant in the above cause, hereby voluntarily waive and relinquish my

right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury.'

Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial."

Revised Code of Ohio, Section 2945.06.
(Jurisdiction of judge when jury trial is waived; three-judge court.)

"In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which such cause is pending shall proceed to hear, try, and determine such cause in accordance with the rules and in like manner as if such cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time on the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of said court, and in case there is neither presiding judge nor chief justice, by the chief justice of the supreme court. Such judges or a majority of them may decide all questions of fact and law arising upon the trial, and render judgment accordingly. If the accused pleads guilty of murder in the first degree, a court composed of three judges shall examine the witnesses, determine the degree of crime, and pronounce sentence accordingly. In rendering judgment of conviction of an offense punishable

by death upon plea of guilty, or after trial by the court without the intervention of a jury, the court may extend mercy and reduce the punishment for such offense to life imprisonment in like manner as upon recommendation of mercy by a jury. If in the composition of said court it is necessary that a judge from another county be assigned by the chief justice, such judge shall be compensated for his services as provided by section 141.07 of the Revised Code."